SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 362

STATE OF WISCONSIN EX REL. JOSEPH E. NIEDZIEJKO and ALFRED KACZKOWSKI,
Petitioners,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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INDEX

	Page
Statement of Facts	1
Questions Presented	3
Argument	3
I. The statements of the petitioners were voluntarily made and no substantial Federal question is raised	3
II. Even if involuntary statements of a police officer were used in a civil discharge hearing, such use does not raise any substantial Federal question under the Fifth and Fourteenth Amendments to the United States Constitution	5
Conclusion	9
Appendix A	10
Appendix B	12

CITATIONS

Cases:

A. Federal

Garrity v. New Jersey (1967) — U.S. —, 17 L. ed. (2d) 562 ..... 6, 7

Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 85 L. ed. 836 4

Pennekamp v. Florida, 328 U.S. 331, 90 L. ed. 1295 4

Spevack v. Klein (1967) — U.S. —, 17 L. ed. (2d) 574 ..... 6, 7

B. State

McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 6

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STATEMENT OF FACTS

Petitioners Joseph E. Niedziejko and Alfred Kaczkowski, were police officers of the City of Milwaukee. As a result of a John Doe investigation of alleged criminal misconduct within the police department, the John Doe magistrate informed the Milwaukee Chief of Police that the petitioners had been accused of accepting money from prostitutes. The Chief of Police directed the petitioners to appear at the Wisconsin State Crime Lab-

oratory for the purpose of submitting to a polygraph examination. Such examination was conducted by Mr. Joseph C. Wilimovsky, Jr., Assistant Superintendent of the State Crime Laboratory.

Prior to conducting polygraph examinations pre-examination interviews took place in the presence of petitioners and their legal counsel, Mr. Ceci and Mr. Frischler. Petitioners were informed of their constitutional rights and told to feel free to consult with their attorneys in private at any time.

Subsequent thereto petitioners were discharged by the Milwaukee Chief of Police and appealed such discharge to the Board of Fire and Police Commissioners. Each was given a full trial before said Board and the discharges were sustained.

The action of the Board of Fire and Police Commissioners was appealed to the Circuit Court of Milwaukee County, thereafter to the Supreme Court of the State of Wisconsin and discharges were sustained.

Petitioners moved for rehearing before the Supreme Court of Wisconsin contending that the admission into evidence at the hearing before the Board of Fire and Police Commissioners of admissions made by them at the State Crime Laboratory interview preceding the taking of the polygraph tests violated their constitutional rights. The Supreme Court of the State of Wisconsin rejected this contention. The results of the polygraph tests were not admitted into evidence.

QUESTIONS PRESENTED

1. Does the petitioners' petition for Writ of Certiorari raise any substantial Federal question as to whether they were denied their rights under the Fifth and Fourteenth Amendments to the United States Constitution in that:

a) were the statements of the petitioners voluntarily made?

The Supreme Court of the State of Wisconsin answered this question "Yes."

and

b) if the statements had been made involuntarily, does their use in a civil discharge hearing of a police officer violate constitutional rights granted under the Fifth and Fourteenth Amendments to the United States Constitution?

The Supreme Court of the State of Wisconsin answered this question "No."

ARGUMENT

I.

The statements of the petitioners were voluntarily made and no substantial Federal question is raised.

Nowhere in any decision of the Court has there ever been a ruling that a voluntary statement or admission cannot be used in a trial or proceeding. Obviously when a statement is voluntary, its use cannot be considered a violation of any constitutional right of the maker of the statement.

The Supreme Court of the United States, repeatedly over the years, has accepted the factual findings of the state courts and has refused to substitute its judgment, except where there has been a palpable evasion of constitutional guarantees.

Mr. Justice Frankfurter in *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 85 L.E. 836, at page 294, stated as follows:

> " * * * It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. * * * "

This decision has been repeatedly cited with authority by the Court and was, in effect, reiterated by Justice Reed in delivering the opinion of the court in *Pennekamp v. Florida,* 328 U.S. 331, 90 L.E. 1295, wherein he said, at page 345:

> " * * * While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights."

The Supreme Court of the State of Wisconsin in rejecting the motion for rehearing of the petitioner clearly and concisely found petitioners' statements to have been voluntary. The court found that the police chief's threat

as to disciplinary action was limited to the taking of the polygraph examination and did not encompass the pre-examination interview. That the interview took place in the presence of petitioners' attorneys and that they were specifically informed by Mr. Wilimovsky of their constitutional right not to answer questions to be purported. The court found that the petitioners had the free choice of taking the polygraph examination with or without the pre-examination interview and they chose the former.

This finding of the court is set forth fully in its decision in petitioners' Appendix, pages 25a and 26a.

While the respondent does not wish to go into detail as to the voluminous testimony in the trials of the two petitioners before the Board of Fire and Police Commissioners, we have nevertheless included within the appendix to respondent's brief, pages 10-12, excerpts of pertinent testimony of Mr. Wilimovsky substantially supporting the findings of the Supreme Court of the State of Wisconsin that the statements of the petitioners were voluntary.

II.

Even if involuntary statements of a police officer were used in a civil discharge hearing, such use does not raise any substantial Federal question under the Fifth and Fourteenth Amendments to the United States Constitution.

The petitioners, in support of their contention that the use of involuntary or coerced statements of a police officer

in a civil discharge hearing is a violation of their constitutional rights, cited the cases of:

> *Garrity v. New Jersey* (1967) — U.S. —, 17 L. ed. (2d) 562.
>
> *Spevack v. Klein* (1967) — U.S. —, 17 L. ed. (2d) 574.

The *Garrity Case, supra,* applies only to the use of involuntary or coerced statements of a police officer in a criminal action. It does not in any way apply to the forfeiture of a public office. In the *Garrity Case* the court stated at page 565 as follows:

> "We agree with the New Jersey Supreme Court that the forfeiture of office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict appellants in their criminal prosecutions."

At page 566 the court quoted with authority *McAuliffe v. New Bedford,* 155 Mass. 216, 29 N.E. 517, and clearly set forth the issue in the *Garrity Case,* as follows:

> "Mr. Justice Holmes in McAuliffe v. New Bedford, 155 Mass 216, 29 NE 517, stated a dictum on which New Jersey heavily relies:
>
> > " 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.' Id., at 220, 29 NE, at 517-518.

> "The question in this case, however, is not cognizable in those terms. Our question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."

In its decision in the *Garrity case,* the court held at page 567:

> " * * * We now hold the protection of the individual under the Fourteenth Amendment against coerced confessions prohibits use in subsequent *criminal proceedings* of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (Italics ours)

The *Spevack Case, supra,* involved the disbarment of an attorney for refusing to produce documents by reason of the Fifth and Fourteenth Amendments. In the majority decision delivered by Mr. Justice Douglas and concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan, the court said at page 578, footnote 3:

> "3. Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

Mr. Justice Fortas in his concurring opinion clearly distinguished between a lawyer's right to remain silent and a public employe who was asked questions relative to his official duties, stating at page 580 as follows:

> "I agree that Cohen v. Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954 (1961), should be overruled. But I would distinguish between a lawyer's

right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding. Garrity v New Jersey, — US —, 17 L ed 2d 562, 87 S Ct —."

Clearly, a policeman is not a second-class citizen and has every right to invoke the protection of the Fifth and Fourteenth Amendments in a criminal action brought against him. It is an entirely different question, however, when an attempt is made to shield misconduct as a public employe in the public service by trying to invoke such constitutional rights. This court in interpreting the Fifth Amendment has repeatedly not only considered the history and purpose of the privilege but has equally also considered the urgency of other public interests. Nothing could be more effective in destroying the confidence of the citizens of this country in law enforcement than to permit a law enforcement officer to refuse to answer questions which bear directly upon his honesty and moral fitness to act as a public officer.

Every officer who takes a position of public trust takes it knowing full well that his conduct in office is subject to constant public scrutiny and should not be allowed to claim a constitutional immunity from answering to the public for his acts in his official capacity.

CONCLUSION

Petitioners have failed to raise a substantial Federal question under the Constitution of the United States for the foregoing reasons, and it is respectfully requested that this petition for Writ of Certiorari to the Supreme Court of Wisconsin be denied.

Respectfully submitted,

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APPENDIX A

Excerpts from transcript of testimony in Hearing on Appeal of Dismissal before the Board of Fire and Police Commissioners relative to Alfred Kaczkowski as follows:

Direct Examination of Joseph Wilimovsky, Jr.

Page of Transcript

92 "Q. Did Alfred Kaczkowski appear before you?
"A. Yes, sir, he did.

"Q. With whom did he appear?
"A. He was represented by Mr. Ceci and co-counsel, Mr. Frischler, an attorney of Madison, Wisconsin.

93 "Q. Now during that period what time did they appear before you?
"A. Well, Mr. Kaczkowski and another subject, who was scheduled first, arrived at approximately nine thirty a.m. I did not have an opportunity to commence the sceduled appointment for Mr. Kaczkowski until three ten p.m.

"Q. I see. Did you have a conversation with Mr. Kaczkowski in the presence of his counsel?
"A. Yes, sir.

"Q. Relative to taking this test?
"A. Yes, sir, I did.

"Q. Was there a preliminary conference?
"A. Yes, sir, with counsel first.

"Q. All right, would you describe what occurred during that conference."

* * * *

95 "Q. Did you question Mr. Kaczkowski prior to giving him the polygraph test?
"A. Yes, I did."

* * * *

Page of Transcript

97 "Q. This you understand, Mr. Wilimovsky, is directed to the conversation which took place prior to the
98 giving of the polygraph test, you understand?

"A. I fully understand.

"Q. All right, continue.

"A. Introduced to Mr. Alfred Kaczkowski, as I say, at approximately threa ten when he entered the interview room; present was Mr. Ceci, Mr. Frischler, and Chief of Police Johnson's representative, Lieutenant Howard Ritzman. I then confronted Mr. Kaczkowski with the reputations and allegations of his accused, Mrs. Johnnie Mae Louise Jackson, and on the basis of the generalities that I could direct, plus one or two specific points,—I might add also that Mr. Kaczkowski was advised by me that even contrary to the fact that he was directed to make himself available for examination, I had advised him on numerous occasions of his constitutional privilege as an American citizen, and that at any time that he wanted to consult with his counsel to feel free to step up and leave the room with counsel. And he did take advantage of my encouragement in that matter. Now after, in reiteration, after explaining to Mr. Kaczkowski what he had been personally accused of by his accuser, Mr. Kaczkowski then had privileged conversation with his counsel, Mr. Ceci and Mr. Frischler, and then returned to the interview room. We then, Mr. Kaczkowski, upon advice of counsel, made certain statements or disclosures to me."

* * * *

APPENDIX B

Excerpt from transcript of testimony in Hearing on Appeal of Dismissal before the Board of Fire and Police Commissioners relative to Joseph E. Niedziejko as follows:

Direct Examination of Joseph C. Wilimovsky, Jr.

Page of Transcript

160 "Q. Pursuant to that request, did you give this examination to Joseph E. Niedziejko?

"A. On Tuesday, the 25th of June of this year.

"Q. Now, would you state the circumstances under which this examination was given.

"A. Mr. Niedziejko made himself available—as a matter of fact, I think he was accompanied by Lieutenant Ritzman, representing Chief of Police Johnson. They arrived at Madison at approximately 10:30 a.m. Mr. Frischler, Attorney Frischler and Attorney Ceci, representing Mr. Niedziejko, also were present. Mr. Frischler and Mr. Ceci were briefed by me relative to the representations and allegations of the accuser, Johnnie Mae Jackson, in reference to Mr. Niedziejko.

"Q. Now, during that briefing, were any questions asked of Mr. Niedziejko relative to gifts?

"A. Well, after I had briefed Mr. Ceci and Mr. Frischler, both of the gentlemen had private or privileged communication with their client, Mr. Niedziejko. Mr. Niedziejko then was formally introduced to me, where I formally and officially advised him of what he was accused of by Johnnie Mae Jackson."